Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
SATELLITE DELIVERY OF BROADCAST NETWORK SIGNALS UNDER THE SATELLITE HOME VIEWER ACT	)	CS Docket No. 98-201

To: The Commission

COMMENTS OF KIEM-TV

Television broadcast station KIEM-TV, Eureka, California, by its attorneys, hereby submits its comments in response to the *Notice of Proposed Rule Making*, FCC 98-302, *63* FR *234,* (Dec. &, 1998) (the "*NPRM*").[1] The factual predicate of the *NPRM* is that certain numbers of people who live within the Grade B contours of network-affiliated television stations are unable to receive the affiliates' signals off air. The FCC therefore proposes to redefine "Grade B" contour in a radical fashion, but only for purposes of the SHVA. The principles discussed below do not permit such a change.

As shown below, the FCC (1) lacks the authority to modify, solely for purposes of the Satellite Home Viewer Act (the "SHVA"), the definition of "Grade B" contour; and (2) in any event, strong public policy considerations argue against such a course.

I. FACTUAL BACKGROUND

1 KIEM-TV hereby requests an extension of the period within which comments relating to the instant *NPRM* must be filed. Publication of the notice in the Federal Register concerning the *NPRM* occurred only four days before the due date. This is an inadequate period within which to obtain full participation of affected parties. In the instant *NPRM,* the FCC attributes the proceeding's hasty schedule to the outcome of recent court cases in which the proponents of a revised Grade B standard lost. However, the Commission was not a party to the litigation nor otherwise subject to a legal mandate for immediate action. Accordingly, KIEM-TV requests that the deadline for filing comments in the instant *NPRM* be extended by one business day, or until December 14, 1998, in order to allow consideration of these comments. Because the Commission staff could scarcely digest all of the comments filed on December 11 in a single day, consideration of these comments should not materially delay this proceeding or prejudice any party to it.

KIEM-TV is the affiliate of the NBC Television Network serving Eureka, California, and the surrounding area. The predicted Grade B contour of KIEM-TV approximates the boundaries of the station's DMA. However, extensive rough terrain in northern California limits the propagation of KIEM-TV from its main transmitter on Redwood Peak to some extent. For that reason, KIEM-TV has created a network of nine translators to provide off-air reception of the station's signal in those areas blocked by terrain obstructions from Redwood Peak.

Notwithstanding these efforts, there remain some pockets where residents are unable to receive an acceptable picture from KIEM-TV. As those situations come to light, KIEM-TV has granted waivers (totaling about one hundred homes investigated to date) in order to allow DSB subscribers to receive distant network signals. More often, though, the individuals requesting waivers are actually able to receive KIEM-TV without difficulty, using an outdoor antenna.

II. CONTROLLING INTERPRETIVE PRINCIPLES

A. LEGAL CONSTRAINTS ON THE FCC'S AUTHORITY TO ACT.

1. *Congress' Employment of a Term of Art Should be Strictly Construed.* In assessing the legitimacy of the potential courses of FCC action outlined in the *NPRM*, it is critical to keep in clear focus a pivotal premise of the SHVA. The SHVA's grant of a compulsory copyright license to satellite video viewers is a limited exception to the exclusive programming copyrights enjoyed by television networks and their affiliates. The scope of that exception is narrow because Congress, in the SHVA, explicitly reaffirmed the fundamental importance that copyright protection plays in preserving the twin values of free, over-air broadcasting and localism.

Accordingly, Congress defined the scope of the permissible infringement of these two principles in clear and familiar terms: The area not served delivery of "an over-the-air signal of

Grade B intensity." 17 U.S.C. §119(d)(10)(A). This is a technical construct that has been relied on in Federal legislation and regulations for over four decades. *See, e.g., Sixth Report and Order,* 41 FCC 148 (1952). Its meaning is not ambiguous, vague, confusing or indeterminate. Indeed, it is difficult to conceive of a term of art from the discourse of telecommunications jurisprudence whose meaning is any more plainly understood. In drafting the SHVA, Congress presumably chose that term for just this reason: Employment of the "Grade B" concept would avoid confusion and ensure that any creative second-guessing of congressional "intent" would be precluded.

Not surprisingly, therefore, litigation by satellite interests over this proviso in the SHVA has not impressed the courts. As the Federal District Court in *ABC, Inc. v PrimeTime 24, Joint Venture* recognized, the SHVA standard for unserved households is strictly objective, and disallows a "subjective inquiry into the quality of the picture on a potential subscriber's television set for any signal strength showing." 1988 WL 544286 (July 16, 1998).

2. *The Agency's Discretion is Limited Where Congressional Intent is Clear.* Further limiting the scope of the FCC's contemplated actions in the *NPRM* is *Chevron U.S., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). Typically invoked to support arguments for agency discretion, in the instant context *Chevron* has a different effect. In *Chevron*, the Supreme Court clarified that the presumption otherwise favoring agency interpretations and decisions within their expertise, is *not* in play where the dispute involves a statute (such as the SHVA) in which Congress has spoken plainly. Here, the operative principle of administrative law is designed to forfend an agency's tinkering with federal legislative acts that are explicit and unambiguous on their face.

B. THESE PRINCIPLES AS APPLIED FOR THE *NPRM*.

1. The *NPRM* apparently is a response to political pressures from DSB interests, applied through consumers who, prompted by DSB operators, have claimed an inability to receive the signal of a local network affiliate. Even if such claims had empirical substance, which they do not (*see, infra,* §II (B)(2)), that would *not* vest the FCC with authority to modify the express terms of the SHVA. That could happen only if Congress had been silent about the technical standard in question or left selection of the standard to the FCC. Then, it could reasonably be argued that the Commission had general authority to change its definition of Grade B intensity when circumstances warranted and with general applicability. However, here not only do the circumstances not warrant such a change, but such a change by the Commission cannot legally alter application of the SHVA. Congressional enactment of that legislation effectively codified the signal strength standard in use by the Commission *at that time.*

FCC intervention in this dispute would clearly contradict the current law as enacted by Congress. Moreover, the change suggested in the *NPRM* would flout continuing congressional efforts to forge from this policy dispute a democratically legitimate consensus by legislative means. Congress has delegated no authority to the FCC to alter the copyright law in so substantive a fashion. First, the Commission lacks subject-matter jurisdiction to consider altering the definition of Grade B intensity solely to affect application of the copyright law. The SHVA makes no reference to any ongoing discretion wherein the Commission could substantively alter U.S. copyright law. The repeated references to Grade B intensity and the Grade B contour in the Act merely signal Congress' desire to employ an objective standard which would balance the public interest in maintaining the system of locally based advertising-supported, or "free", broadcasting against the interests of residents of truly remote areas in the reception of broadcast signals.

In fact, the only relevant reference to Commission authority within the SHVA is contained in a parenthetical explaining the derivation of the term "Grade B." The courts could hardly conclude that such a passing reference somehow gave the Commission authority to re-write the SHVA in a substantive fashion. Such a conclusion by the Commission would clearly be erroneous. Rather, the context of the references to the Grade B standard in the legislation is a persuasive indication that Congress intended to use the FCC's current Grade B standard for purposes of the SHVA. After all, Congress did not refer to a Grade B standard "*to be defined*" by the FCC, but to one that was already in existence.

In the SHVA, Congress adopted a standard broadly employed by the Commission for many decades. Congress could not have anticipated or have approved at that time every potential re-definition that the Commission might later promulgate. The Commission impliedly admits as much in the instant NPRM by conceding that it does not have unbridled discretion to define Grade B signal intensity as greater than what has traditionally been defined as Grade A service. Note, however, that if the Commission accepts the premise that it does have the authority to re-write the SHVA, in effect, by re-defining the term Grade B for the purpose of applying that Act, then there are no theoretical limits to such discretion.

The adoption of either of the DSB industry proposals would define Grade B as better than Grade A. Obviously, the term Grade B would lose all meaning were it to be defined as a better signal than Grade A. The Commission should retain the present 90-50 standard for Grade B, wherein the best 50 percent of locations should receive an acceptable video transmission 90 percent of the time. The two DSB industry proposals, wherein the Grade B coverage would decrease to include only the best 95 or 99 percent of locations receiving an acceptable signal, respectively, 95

or 99 percent of the time, would dramatically clearly undermine Congress' effort to balance the interests of the DSB industry and free, local television by adopting the 90-50 Grade B standard, which had been in effect since 1952.

Indeed, the arbitrariness of such a course by the FCC is reinforced by considering the FCC's own systematic employment of the "Grade B" construct in its rules. The Commission's rules refer to "Grade B" in no fewer than 24 of its current provisions (see Exhibit A). None of these references utilizes a Grade B definition distinct from the traditional one, with the *sui generis* exception of §22.657. No doubt the clear meaning of the term established over decades of use led Congress adopted Grade B as its objective standard in the SHVA. Yet the instant proposal would turn this objective standard into no more than a variable, subject to the Commission's continuous review.

The existence of so many references to the Grade B standard also limits the Commission's ability to re-define Grade B with general applicability, since the standard affects so many different rules. The *NPRM* notes that the current Grade B standard, devised nearly five decades ago, could not have anticipated the issues raised by DSB. However, this argument is like saying that the FCC cannot measure communications towers in meters because the creators of the metric system did not anticipate electronic communications. Moreover, the point would also apply to many of the two dozen rules which make use of the Grade B standard. In sum, Congress used the established standard with full knowledge of the issues posed by DSB.

2. Moreover, such claims are contradicted by the experience of KIEM-TV. The station has investigated numerous instances, of illegal distant network signals. With relatively few exceptions, in every instance in which the station has measured its signal strength at an individual home in question, that home has been able to receive the station's signal using a rooftop antenna.

Most often where residents claim that they cannot receive the KIEM-TV signal over-the-air, they have attempted to do so without the benefit of an appropriate antenna, correctly installed and positioned using a rotor.

The proponents of expanded direct-to-home satellite broadcasting (DSB) are not satisfied with the explosive growth they have experienced in recent years. In the pursuit of ever more customers, they seek to supplant local broadcast network affiliates as suppliers of network programming. The current battleground is the area within the Grade B contour of numerous network affiliates where the DSB proponents contend the affiliates do not place an adequate off-air signal. On the questionable theory of inadequate coverage, DSB operators have flouted Federal law and made many illegal installations, where distant network signals are fed to residents of the natural service area of KIEM-TV.

The experience of KIEM-TV therefore shows that the stated basis for a change in the Grade B coverage standard under the SHVA is bogus. No doubt other stations in other markets will have had the same experience, to the extent that they have gone to the trouble to investigate claims of inadequate coverage. Even in mountainous areas where terrain obstructions limit reception within a given station's predicted Grade B contour, thousands of translators have been installed to overcome this problem. Consequently, the facts do not support the perception spread by the DSB industry that the current Grade B definition is inadequate. Circumstances therefore do not warrant the change proposed by the Commission.

III. POLICY CONSIDERATIONS

Aside from the profound legal questions limiting FCC authority in this matter, legitimate policy reasons provide further support for a cautious approach by the Commission. A local broad-

cast station is best positioned to serve the population in the public interest. Local news, weather and announcements relating to events of local importance are available through local broadcast television. In fact, most Americans receive the majority of their information related to politics, policy, and current events from television. The high cost of the alternatives to free broadcast television makes the services provided by KIEM-TV and other broadcasters essential to the civic participation of most average Americans. In addition, the emergency alert system is able to target the counties served by a broadcast station. Where a local station is carried on a cable system, these advantages of local service are also afforded to cable customers. The same is not true with those who receive DSB transmissions until DSB operators carry local stations.

The Commission's proposal, if adopted, could in many markets destroy the access to local news and programming that the FCC consistently claims to promote. A relaxed Grade B standard would remove all incentive for the DSB industry to deliver local signals to their subscribers. The DSB industry essentially seeks greater authority to re-transmit distant signals, as opposed to the distribution of any local programming. This creates a "free-rider" problem for terrestrial broadcasters in that the creation of local programming will cease to yield adequate returns, due to audience shares lost to distant signals imported via satellite. Multichannel video competition will arrive only when DSB operators provide local signals under the same rules that govern the cable television industry. Thus, FCC intervention in this area -- already illegitimate under the law -- is also ill-advised from a policy perspective, since it threatens to reduce the production of local television content.

The action contemplated by the Commission would erode the "mass" nature of free broadcasting as a mass communications medium. Although the desire of advertisers for genuine mass

media outlets has allowed local service to flourish, this system must not be taken for granted. So long as DSB operators have not created their own systems to cover local news and local problems, expanding the customer base of DSB does not equate to the public interest.

Moreover, free broadcast television serves the public interest by providing common cultural experiences within local communities. For those reasons, the Commission should resolve to do no harm to free broadcast television in its effort to promote competition to cable television.

The proponents of a re-defined Grade B contour routinely ignore the potential of DTV (and MMDS) by insisting that a re-defined Grade B contour is the best means by which to achieve competition in the multichannel video service industry. Essentially, the DSB industry presents itself as America's only hope of rescue from supposedly high cable rates at the hands of cable television franchise monopolies. In order to accomplish their objective, the DSB industry demands that policy makers threaten the economic viability of free local broadcasting, even though it also competes with cable in many ways. In an age of digital television, free broadcasting will present new opportunities for narrowcast competitors to cable television without abandoning the mass market that network television and local news broadcasts provide. People with low and moderate incomes will have full access to this type of multichannel competition. Due to the high initial cost of reception equipment, and recurring monthly charges, however, the DSB industry cannot serve the poor on a par with terrestrial broadcasters.

Unfortunately, many in the DSB industry have sold their products to consumers illegally. The courts have uniformly ruled against the DSB industry when it has been challenged by networks and broadcasters for copyright violations. Now they seek, in effect, to alter the copyright laws through this rulemaking. The Commission should not, through this means, rescue the DSB industry

from the consequences of its illegal activities.

Conclusion

Because the commission lacks authority to re-define the Grade B standard with any applicability to the SHVA, the Commission should terminate this proceeding without trammeling on the prerogatives of Congress. Even if the Commission had authority in this area, it should decline the invitation to change the Grade B standard. Because relaxing the Grade B definition in the manner advocated by the DSB industry will undermine the economic viability of free, local broadcasting, the FCC should retain its present definition.[2]

Respectfully submitted,

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December 14, 1998

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2 Should the FCC decide that it does hold the authority to proceed in this instant rulemaking, KIEM-TV urges the Commission to limit its action to an update of predictive methods consistent with the Longley-Rice method used in recent Digital Television (DTV) proceedings before the Commission.

EXHIBIT A

"Grade B" references in FCC Rules

0.283(a)(1)(iii)	Authority not delegated to Chief, Mass Media Bureau to decide duopoly ownership issues for TV stations w/ Grade B contour overlap
0.283(a)(11)	Authority not delegated to consider VHF station expanding B into UHF station's B, where area served by fewer than 4 VHF stations.
1.420(h)	Additional procedures required when FM stations propose amendment to table of allotments when station will overlap w/ Grade B contour of TV station operating on Channel 6.
15.242(d)	Biomedical telemetry devices must be Grade B contours of TV stations by specified distances.
22.625	Point to multipoint transmitters must protect specified TV stations by being located outside Grade B contour.
22.657(d)(e)	Distance to Grade B contour for UHF station assumed to be 55 miles.
73.525(e)	Method of calculating interference to TV Ch 6 from noncommercial educational FM stations uses Grade B as data.
73.622(e)	During transition to DTV, the assumed service area for the a DTV station is the analog station's Grade B contour, rather than the noise-limited contour calculated by Longley-Rice methods.
73.622(f)	DTV maximum power and antenna heights were chose to replicate analog station's Grade B contour.
73.3555(b)	TV duopoly rule forbids Grade B overlap of commonly-owned stations.
74.705(a)	The protected contour of a TV broadcast station is its Grade B contour.
74.731(j)	TV booster stations must be located within, and signals must not exceed, the Grade B contour of the primary station.
74.1205(c)	Noncommercial educational FM station not approved if its interfering contour overlaps with Grade B contour of TV station operating on of Ch 6 .

76.54(c)	Notice of "significantly viewed" surveys for cable carriage must be served on all TV broadcast stations whose Grade B contours overlap the surveyed community.
76.55(b)	NCE station qualified for cable carriage if the cable headend is within the Grade B contour of such station.
76.70	Exemption of cable system from input selector switch requirement uses Grade B contour.
76.92(d)	Community television systems must, upon request translator permittee, cease carriage of network signals from distant stations.
76.501	Cable system may not carry signal of commonly-owned TV station within the Grade B contour.
80.215(h)	Grade B contour for Channel 13 TV stations used to predict interference by AMTS coast stations.
80.559(c)	Operational fixed stations secondary w/in Grade B contours of TV stations operating on Ch 4 or 5.
87.451(c)	ditto
90.307(b)	UHF-TV station sharing frequencies w/ land mobile base station is protected in its Grade B contour.
95.855(b)	CTS & RTU ERP limited within Grade B contour of Channel 13 TV station.
95.1011	Protection of television Ch 13 from LPRS interference.